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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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BOSE CORPORATION,
PETITIONER,

*v.*

CONSUMERS UNION OF UNITED STATES, INC.,
RESPONDENT.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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# BRIEF FOR PETITIONER

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## Questions Presented

1. Whether a Court of Appeals is bound by the "clearly erroneous" rule of FED. R. CIV. P.52(a) in reviewing a District Court's findings of fact, arrived at after a lengthy trial, that a false and disparaging statement was published with knowledge that it was false or with reckless disregard for the truth, when a constitutional right is asserted.

2. Whether an appellate court may reject the findings of a United States District Court judge who was the trier of fact and who found on the basis of clear and convincing evidence that the defendant published a false statement with knowledge of its falsity or with reckless disregard for the truth and further found expressly that the author's testimony to the contrary was not credible.

3. Whether subsequent editorial

review by the editorial staff of a publisher can bar relief for publication of a false and disparaging statement written by an employee of the publisher, where the trier of fact found on the basis of clear and convincing evidence that the author knew that the statement was false when he wrote it or acted with reckless disregard of its truth or falsity.

4. Whether an appellate court can overturn a judgment for a plaintiff under the *New York Times Co. v. Sullivan* standard on the basis of testimony about editorial review which the trial judge, sitting as finder of fact, had found to be "wholly untrustworthy and ... not credible".

5. Whether an appellate court can deprive a party of compensatory damages in a product defamation case by ignoring findings on credibility made by the trial judge and instead relying on evidence

which the trial judge found to be not credible.

6. Whether an appellate court can overturn a trial court's finding of "actual malice" when there was sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of its publication.

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# BRIEF FOR PETITIONER

## Citations to the Opinions and Judgments Delivered in the Courts Below

The opinion of the United States District Court for the District of Massachusetts on liability (App. X38-168),[1] is

[1] Reference to the Petition is to "Pet." page numbers. Reference to the separate appendix filed with the petition containing the lower court opinions is to "App." followed by "X" page numbers. Reference to the Joint Appendix herein is

reported in 508 F.Supp. 1249, 7 Media L. Rep. (BNA) 1069, and on damages (App. X168-200), in 529 F.Supp. 357, 7 Media L. Rep. (BNA) 2481. The Amended Final Judgment is at J.A. 344. The opinion of the Court of Appeals (App. X1-X37), is reported in 692 F.2d 189, 8 Media L. Rep. (BNA) 2391, and its judgment is at J.A. 346.

The opinion of the District Court denying respondent's motion for summary judgment is reported in 84 F.R.D. 682, 210 U.S.P.Q. (BNA) 645, 5 Media L. Rep. (BNA) 2404, in denying respondent's motion to dismiss in 181 U.S.P.Q. (BNA) 543, in certifying a question of state law to the Massachusetts Supreme Judicial Court in

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to "J.A." page numbers. Reference to the appendix in the Court of Appeals is to "A" page numbers. Reference to the trial court transcript is to "Tr." page numbers. Reference to petitioner's and respondent's exhibits is to "PX" numbers and "DX" letters, respectively.

19 Fed. R. Serv. 2d (Callaghan) 442, and in requiring petitioner to plead special damages in 16 Fed. R. Serv. 2d (Callaghan) 1090. The opinion of the Massachusetts Supreme Judicial Court ruling that the filing of the complaint did not toll the statute of limitations for respondent's counterclaims is reported in 367 Mass. 424, 326 N.E.2d 8.

## Jurisdiction

The judgment of the Court of Appeals was entered on November 2, 1982 (J.A. 7, 346). A timely petition for rehearing suggesting rehearing *en banc* was denied on November 23, 1982 (J.A. 7). The petition for a writ of certiorari was filed on January 20, 1983, and granted on April 25, 1983 (J.A. 7). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## Constitutional Provisions Involved

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .. U.S. Const. Amend. I.

No person shall . . . be deprived of . . . property, without due process of law . . .. U.S. Const. Amend. V.

## Federal Rule of Civil Procedure Involved

### Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it

will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

## Statement

### *A. Introduction.*

In the May 1970 issue (PX2, Tr. 9, 13) of respondent's monthly magazine, *Consumer Reports*, respondent reported on a series of tests and measurements conducted by its engineers in an article entitled "Loudspeakers" (the Article) (PX7, Tr. 10, 13)[2]. In addition to an evaluation of the quality and performance of 24 medium-priced loudspeakers, represented as being based on objective tests and measurements conducted by respondent's engineers, the Article reported on tests of petitioner's more expensive Bose 901 loudspeaker system

[2]Ten copies of PX2 have been deposited with the Clerk. The Article, PX7, appears at pp. 272-78 of PX2 (J.A. 338).

in a boxed-off section picturing the 901 system (App. X46-50, 54). Prior to publication of the Article, the Bose 901 system had received the best reviews which ever had been given to a loudspeaker product (App. X196).

Dr. Amar G. Bose, petitioner's president and principal witness, invented the the 901 system, which was "unique and unconventional" in shape and design. Respondent conceded that Dr. Bose is an expert in the field of loudspeaker design (App. X41-43, J.A. 8-26).

After attempts to obtain a retraction failed (J.A. 77), petitioner commenced this action in the United States Court for the District of Massachusetts on February 23, 1971 (J.A. 2) to obtain relief for the harm caused by respondent's false and disparaging report on the Bose 901 loudspeaker system. Jurisdiction was

based on diversity of citizenship, 28 U.S.C. § 1332(a)(1), on the Lanham Act, 15 U.S.C. § 1121, and on 28 U.S.C. § 1338(a) and (b) (App. X38-39).

After 19 days of trial on all issues except damages (App. X39) during February, March and April 1980 before Senior District Judge Julian without a jury (J.A. 2-5), the District Court filed an opinion (App. X38-168) on January 21, 1981 (J.A. 5) finding that petitioner had sustained its burden of proving, by clear and convincing proof, that respondent published a false statement of fact disparaging the Bose 901 system with knowledge that the statement was false or with reckless disregard for the falsity, as alleged in Count III of the complaint. It deferred entering judgment until after the separate trial on the issue of damages. The District Court ruled that

petitioner did not sustain its burden of proof on Counts I and II of the complaint, which were based on common law tort liability and violation of section 43(a) of the Lanham Act, respectively (App. X143-46).

After two and a half days of trial on damages before Chief Judge Caffrey without a jury in June 1981 (J.A. 5), the District Court entered an opinion (App. X169-201) and final judgment for petitioner on December 30, 1981 (J.A. 5). Petitioner moved to amend the final judgment on January 8, 1982 (J.A. 5). The District Court entered an Amended Final Judgment on February 8, 1982, awarding petitioner $210,905.64 in damages, interest and costs (J.A. 6, 344, App. X1).

Before analyzing specific statements in the Article, the District Court said, "The Court concludes that the Article,

when read as a whole, is disparaging (App. X70)."

The District Court found a number of representations made by respondent in the Article to be false or misleading, but not damaging to petitioner (App. X70-71, X76-77), found a statement of opinion not actionable (App. X80), and found that petitioner had not sustained its burden of proof with respect to other statements (App. X85, X99).

*B. The Court of Appeals agreed with the District Court's finding that the statement "Worse, individual instruments heard through the Bose system . . . tended to wander about the room," was disparaging and assumed that it was a false statement of fact.*

The District Court found the statement in the Article, "Worse, individual instruments heard through the *Bose* system . . . tended to wander about the room," to be a false and disparaging statement of fact which was damaging to petitioner (App. X99-106).

The statement purported to describe what a "panel" of two engineers, Seligson, the author, and his assistant, Lefkow, observed during a "special listening test (J.A. 96-103)." Seligson and Lefkow said they observed sounds of only a violin moving back and forth between a pair of Bose 901 loudspeakers near a wall at one end of the listening room (J.A. 148, 156-60, 244-47.

Both Seligson and Lefkow indicated on large sheets prepared in open court during cross examination by a red line with arrowheads and a red rectangle, respectively, the region between the pair of Bose 901 stereo loudspeakers (represented by pentagons which look like home plate on a baseball field) in which they observed movement of only some violin notes when playing an unidentified record (PX29, J.A. 170-71, PX35, J.A. 257-58;

J.A. 156-60, 244-47). Reproductions of these exhibits follow this page.

The District Court said, "Because such movement between two loudspeakers is a common effect [with all stereo loudspeaker systems] and is to be expected, a reader would not be surprised to read about 'instruments' moving along the wall between two loudspeakers (App. X101)." Dr. Bose, Dr. Green (respondent's psychoacoustic expert), and Lefkow agreed that such movement between left and right loudspeakers is a common effect with all stereo loudspeaker systems (J.A. 52-57, 234-36, 312-14, 325-26).

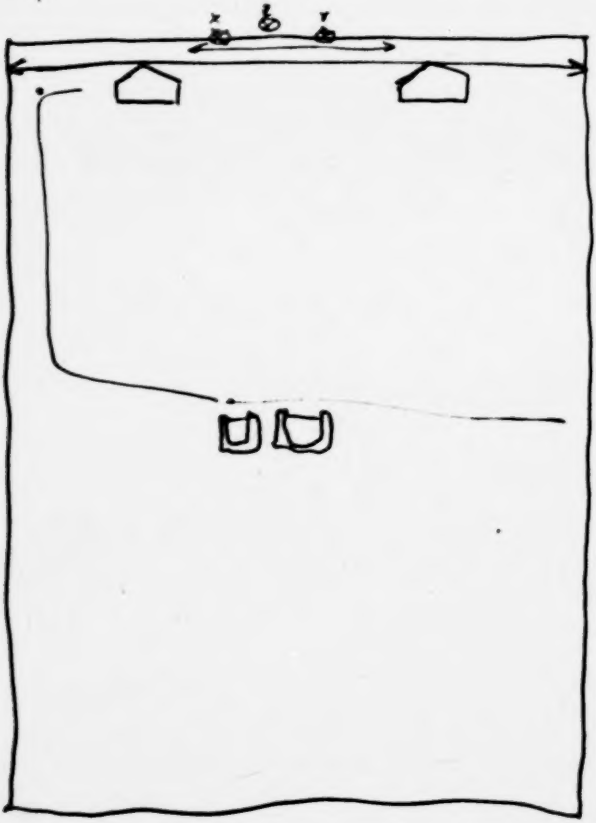
The District Court said:

> The Court also finds that the average reader would interpret the word "about" in its plain ordinary meaning. Florman [respondent's technical director] agreed that the word "about" in this context means the same thing as "around". Tr. 12-117, 118 (J.A. 219). In fact, Seligson's initial draft contained the words "around

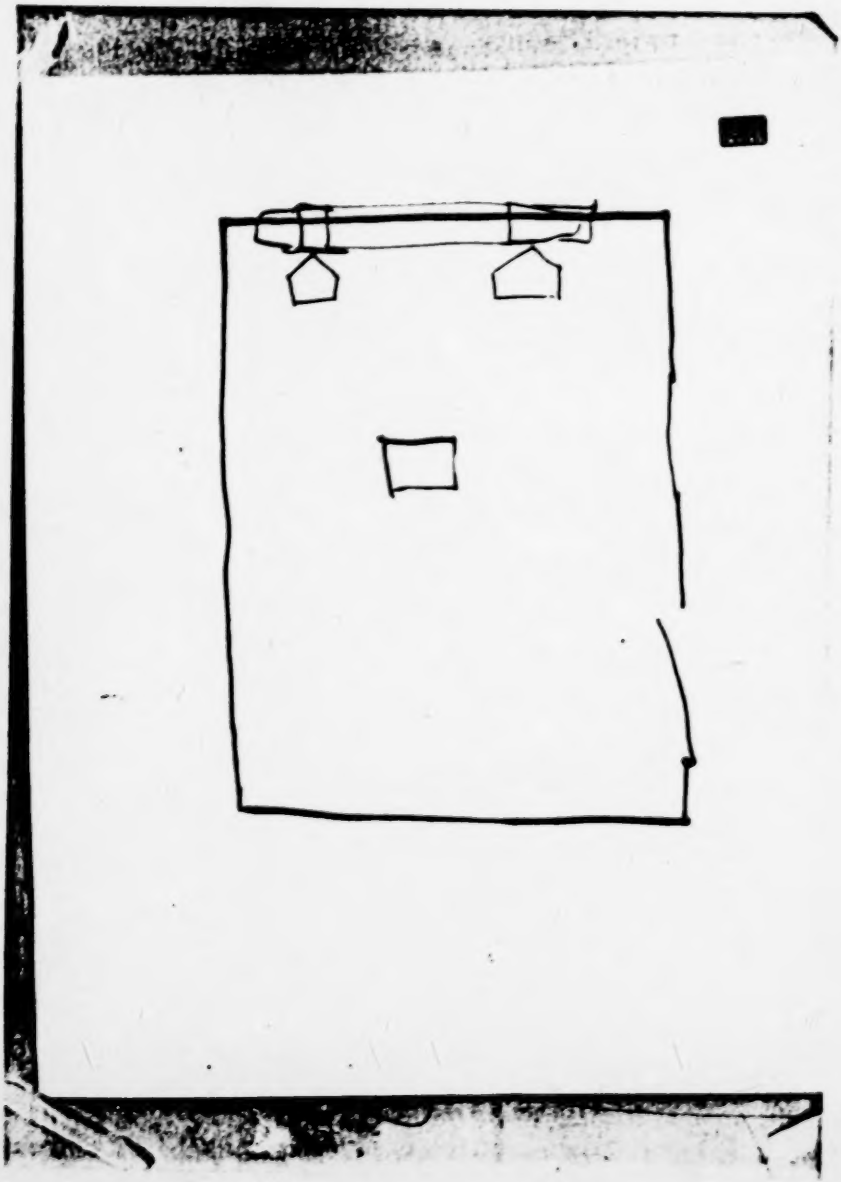
the room," rather than "about the room." PX-10, at p. 29 (App. X155, X161).

The absence of similar observations by other listeners, both untrained and professional, tends to support the conclusion that Seligson and Lefkow did not hear "instruments" that "tended to wander about the room." If the Bose 901 actually produced such unusual auditory effects it would be natural to assume that Bose 901 owners would complain to Bose about them. Yet Dr. Bose testified that to his knowledge no Bose 901 purchaser had ever complained to Bose about the Bose 901 causing "instruments" to appear to wander about the room (J.A. 80-81). In addition, none of the reviews of the Bose 901 that were reprinted by Bose (DX-A) contain a statement that could be construed as referring to wandering "instruments." On the contrary, one of the reviews (DX-A p. 13), published in Stereo & Hi Fi Times, contains the following statement, which seems to directly contradict CU's comment about "instruments" that "tended to wander about the room":

> A multi-directional speaker seems to have its sound escape from its box. The source of the sound becomes an area of space above and behind the actual enclosure. This is created beautifully by these speakers. A stereo pair fills the wall with stereo, yet each instrument has its



PLAINTIFF'S EXHIBIT 29



PLAINTIFF'S EXHIBIT 35

> prescribed space - and it stays there. You can spread these speakers much wider apart than conventional boxes without creating a "hole-in-the-middle:" effect. DX-A, p. 13 (Emphasis added).

> Based on the foregoing analysis, the Court finds that the statement in the May 1970 Article that "individual instruments heard through the Bose system . . . tended to wander about the room" is false. The Court also finds that the statement is disparaging. A statement that attributes such grotesque qualities as instruments wandering about the room to the plaintiff's product could have no effect other than to harm the reputation of the product. That such a harmful effect was intended is demonstrated by the use of the word "worse" to introduce the sentence. Use of the word "worse" obviously indicates that what preceded was a deficiency but what followed would be an ever greater deficiency in the product (App. X103-06) (footnote omitted).

In reviewing and reversing the judgment of the District Court, the Court of Appeals held the statement to be disparaging and assumed that it was a false statement of fact (App. X19-21).

The Court of Appeals observed that

> the seeming scientific nature of the article--indicated by quantitative ratings, a description in the beginning of the article of the laboratory testing performed, and the use of such terms as "panelists" and "engineers" to describe the CU employees who performed the tests--would support the position that the statements are factual (App. X18).

The Article makes reference 32 times to words or phrases from the following group: "test program," "test," "test out," "tested," "tests," "testing," "testing methods," "carefully designed listening-panel test," "test speakers," "listening test," "objective and subjective tests," and "objective laboratory tests." The Article makes reference 10 times to words or phrases from the following group: "laboratory measurements," "measurable," "measurable factors," "measured in the lab," "measurement," "measured directly," "inferred from other measurements," "measurements,"

"quantitative measurements," and "heard and measured." The Article makes reference 11 times to words or phrases from the following group: "listening-panel," "panelists," and "panel." The article twice makes reference to "CU's engineers." PX7.

The District Court found:

> Dr. Bose, who attempted to combat the perceived negative effects of the Article by visiting and talking with his dealers, testified that with respect to the comments contained in the Article the most frequent complaints that he heard from dealers and consumers concerned "The enlarged and wandering instruments and the statement about gigantic power required." Tr. 2-144 (J.A. 62). Thus, the false statement that "individual instruments heard through the *Bose* system . . . tended to wander about the room" cannot be considered a *de minimis* violation of the plaintiff's rights (App. X106-07).

*C. The District Court found actual malice based on clear and convincing proof.*

After finding the statement false and disparaging, the District Court ruled that

the standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), applied to product disparagement cases, and that petitioner was a "public figure." The District Court therefore required petitioner to show with clear and convincing proof that respondent had published the false disparaging statement with the knowledge that it was false or with reckless disregard of its truth or falsity (App. X132-33).

The District Court observed that petitioner did not ask the Court to infer the existence of actual malice from falsity alone, but to couple the falsity of the statement with the fact that the two engineers of respondent who made up the "panel" for the "special listening test," must have known that the statement was false (App. X140). In rejecting the profession of Seligson's good faith belief

in the accuracy of the Article as written (J.A. 123-24, 147, 169), the District Court said, "Because Seligson wrote the words upon which the false statement in the Article was based, it is his state of mind that is critical[44] (App. X140-41)."

The District Court concluded, "After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible (App. X142)."

Monte Florman, the associate technical director of respondent, also

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[44]The members of CU's editorial department would naturally have to rely on Seligson's representations that a panel had heard instruments that "tended to wander about the room." Lefkow testified that the Article as a whole accurately reflected CU's test data. Nevertheless, to the extent that Lefkow, as Seligson's subordinate and friend, would be expected to substantiate Seligson's position, right or wrong, his testimony can be discounted. In addition, Lefkow was never specifically questioned about the critical words "about the room (App. X168)."

testified at trial on various matters (J.A. 195-221), including what he observed during a June 1970 listening test after petitioner complained about the Article (J.A. 203-06).

The District Court ruled on Florman's credibility:

> The defendant also places reliance on the testimony of its technical director, Monte Florman, who claims to have heard certain unusual auditory effects when listening to the Bose 901. After appraising Florman's demeanor and the substance of his testimony, however, the Court finds that Florman's testimony is wholly untrustworthy and is not credible. Consequently, to the extent that Florman's testimony differs from that of Seligson and Lefkow, it has been disregarded (App. X163 n.33).

The District Court ruled:

> [T]he Court concludes, on the basis of proof which it considers clear and convincing, that the plaintiff has sustained its burden of proving that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity (App. X143).

The two "panelists" testified that

they made the tests on which the false statement was based on January 23, 1970, about three months before the Article was published, and recorded their observations on a little over a page in a laboratory project data book under the caption "Personal Observation on Bose 901 upon listening for several hours (PX9, Tr. 85; J.A. 339-40)." Seligson and Lefkow read these observations into the record (J.A. 97-103, 232-34). No other information was recorded on this "special listening test."

The only instruments identified in these recorded observations are a violin and piano. Both Seligson and Lefkow testified that the piano they heard through the Bose system did not move (J.A. 148, 159, 244).

After publication of the Article, petitioner complained and Dr. Bose asked to meet with respondent's management and

technical personnel. This meeting was held at respondent's laboratories on June 3, 1970 (J.A. 63).

In a memorandum of Florman dated June 4, 1970 (PX33, J.A. 209, 221; Pet. 13), the following appears relative to the false and disparaging statement.

> . . . Bose took extremely strong exception to the concept of wandering, and expressed the view that on theoretical grounds such an observation was patently impossible. There was some discussion on the philosophical considerations of subjective observations made that run counter to theoretical considerations. (After the meeting, WS [Walker Sandbach, then respondent's executive director] reported to MF [Monte Florman, respondent's technical director and the author of the memorandum] that CEW [Colston E. Warne, then respondent's president] felt that we were, in his opinion, weakest in our arguments about the wandering instruments. . .. (J.A. 209-13).

Seligson and Nagel, then respondent's technical director, were also at this June 1970 meeting (J.A. 63-64). Dr. Bose asked (1) if the entire "panel" had heard

had heard the wandering instruments through the Bose system and, (2) "Did the instruments just move back and forth between the two speakers along the wall or did they actually move out into the room?" Seligson replied that the instruments moved out into the room, and the entire panel had heard these wandering instruments (J.A. 64-65).

Dr. Bose testified that he then asked how many members were on the panel, because he had read the article entitled "How Consumers Union Tests Speakers" published in 1969 in Stereo Review magazine authored by Seligson (Tr. 39) representing that respondent used 12 music students as a panel for its loudspeaker listening tests (PX6, Tr.40). Seligson said that the "panel" which allegedly heard individual instruments through the Bose system

wandering about the room consisted of "two (J.A. 66-67)."

Dr. Bose twice asked for a demonstration of this phenomenon (J.A. 67-71). Seligson acknowledged that Dr. Bose made this request and testified that it would have taken him about a half hour to set up a demonstration of the Bose 901 speakers through which the "panelists" allegedly had heard instruments wandering about the room (J.A. 139).

Dr. Bose requested the names of the records that the "panelists" played during the "special listening test" when they allegedly heard instruments wandering about the room. Seligson promised he would furnish the names of those records to Dr. Bose, but petitioner was never furnished with these names (J.A. 71, A394-95). Respondent did not identify any of these records at trial (J.A. 151) nor

make any record of the stereo records used during a prior listening test by Lefkow (J.A. 236-37).

The District Court found that respondent "refused to disclose to Bose the names of the recordings on which the CU 'panelists' supposedly had heard the 'wandering instruments', so Bose was unable to refute that false claim by making demonstrations using the same recordings (App. X194-95)."

Seligson wrote the first draft of the portion of the Article relating to the Bose 901 system in a Report to Editorial (PX10; J.A. 125-29, App. 65). Seligson there listed as one of "a number of other disturbing aspects to the Bose system. [that] [i]nstruments not only could not be placed with precision but appeared to suffer from giganticism and a tendency to wander around the room . . . (App. X155, X161)."

Seligson repeatedly checked the statement for accuracy before publication in the Article (J.A. 129-37, 145, App. X32-33).

Seligson testified on direct examination that while listening to the music, "we walked around the room (J.A. 99)" and on cross examination that "You could say I wandered about the room (J.A. 153)."

After quoting a portion of Seligson's testimony on cross examination concerning the "instruments" that "tended to wander about the room (App. X141, J.A. 169)" following testimony by Seligson that the false and disparaging statement might spur consumers to buy the Bose speakers (J.A. 163-69), the District Court said:

> Thus, according to Seligson, the words used in the Article -- "About the room" -- mean something different to him than they do to the populace in general. If Seligson is to be believed, at the time of publication of the Article he interpreted, and he

> still interprets today, the words "about the room" to mean "along the wall." After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this not credible. Seligson is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible for the Court to believe that he interprets a commonplace word such as "about" to mean anything other than its plain ordinary meaning (App. X141-42).

The District Court set forth the rule it was applying:

> "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1967) [sic; 1968[ (App. X139).

*D. The Court of Appeals ruled that the finding of actual malice was not based on clear and convincing proof.*

After noting that petitioner did not dispute that it is a "public figure" with respect to the subject matter of the Article (App. X21), the Court of Appeals said:

We focus, therefore, on the district court's holding that Bose proved by clear and convincing evidence that CU published the words "[Worse,] individual instruments [heard through the *Bose* system] . . . tended to wander about the room" with knowledge that they were false or with reckless disregard of their truth or falsity. In performing this review we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a); instead, we must perform a de novo review, independently examining the record to ensure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof. . . . At the same time, we recognize that we are in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact (App. X22-23).

The Court of Appeals observed:

The subjective determination of whether CU in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts. . . . A court typically will infer actual malice from objective facts. . . . These facts should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice. Such evidence is

lacking in this case (App. X27-28).

The Court of Appeals did not mention the District Court's analysis of Seligson's motivation to disparage the Bose 901 system under the heading "Motivation (App. X133-38)." After finding that Seligson did not downgrade the Bose 901 system in order to smooth the way for his own invention of a loudspeaker on which a patent was granted on November 4, 1969, while he and other engineers and technicians of respondent were making tests and measurements on loudspeakers for the Article (App. X61-65, X136), the District Court said:

> It does not necessarily follow from this finding, however, as the defendant suggests, that Seligson therefore had no reason at all to downgrade the Bose 901. The record discloses at least two other influences that could have caused Seligson to make deprecatory comments about the Bose 901. First, the plaintiff suggested, but presented scant proof, that the defendant's magazine

has a built-in bias against higher-priced products because it claims to save money for consumers. According to the plaintiff, such a bias would lead the defendant to disparage higher-priced products such as the Bose 901. Second, according to Dr. Bose, the defendant's executive officer, Walker Sandbach, stated that CU resorts to the use of "sarcasm" and "spice" in order to boost circulation. Dr. Bose testified, without contradiction, that the defendant's officers told him that a survey supported their belief that consumers read Consumer Reports for entertainment rather than for product information. Dr. Colston Warne, the chairman of CU's board of directors, told Dr. Bose that the readers of Consumer Reports "love to read about vermin hair in Campbell soup (J.A. 75-76)." The desire to inject a little "sarcasm" and "spice" is another possible motivation for Seligson's attribution of grotesque qualities to the Bose 901.

Thus although the Court has found that Seligson's patent did not motivate him to downgrade the Bose 901, the Court cannot justifiably say that there was no possible reason for Seligson to disparage the Bose 901. Consequently, the Court will not indulge the inference, suggested by the defendant, that because there was not motivation to disparage, there could be no actual malice (App. X136-138) (footnote omitted).

After stating, "CU's editorial

procedures reveal no evidence of actual malice (App. X32)," the Court of Appeals summarized the editorial procedures. This summary was based on the testimony of respondent's Technical Director Monte Florman whose testimony had been found to be "wholly untrustworthy and . . . not credible" by the District Court (App. X163 n.33). Compare App. X32-34 with J.A. 197-99).

The "associate technical director" referred to by the Court of appeals was Florman (J.A. 196). Prior to trial Florman was promoted to technical director (J.A. 195).

Both the Technical director then, Karl Nagel, and Florman, then associate technical director, reviewed the Article (J.A. 129-30). Florman testified that he never asked Seligson what he had heard after Dr. Bose said on June 3, 1970, that

the wandering instruments were a scientific impossibility (J.A. 213-14).

Both Seligson and Dr. Green, respondent's psychoacoustic expert, testified that they were unaware of any technical literature which referred to a musical instrument which appeared to a listener to wander about the room when its sound was played through a loudspeaker (J.A. 192-93, 317-20).

The Court of Appeals said:

> Even though we accord relatively little weight to CU's claims of good faith and lack of any motivation to disparage the Bose 901, we are unable to find clear and convincing evidence that CU published the statement that individual instruments tended to wander about the room with knowledge that it was false or with reckless disregard of whether it was false or not. The evidence presented merely shows that the words in the Article may not have described precisely what the two panelists heard during the listening test. CU was guilty of using imprecise language in the Article--perhaps resulting from an attempt to produce a readable article

> for its mass audience. Certainly this does not support an inference of actual malice (App. X34-35).

There had been no evidence that Seligson wrote the false and disparaging statement in "an attempt to produce a readable article for its mass audience." The District Court said that the Article contained respondent's evaluation on the quality and performance of the loudspeakers based on respondent's tests of them (App. X46).

The District Court found that the failure of respondent to describe "precisely what the two panelists heard during the listening test" resulted in a "statement that attributes such grotesque qualities as instruments wandering about the room to the plaintiff's product [that] could have no effect other than to harm the reputation of the product (App. X105)." (footnote omitted).

The District Court found that what the two panelists testified they heard, movement along the wall between two loudspeakers, is a common expected effect with all stereo loudspeaker systems when present in the stereo recording process (App. X101).

The Court of Appeals did not mention the rulings of the District Court on the credibility of respondent's witnesses Seligson (App. X142), or Florman (App. X163 n.33), under the heading "Our Review (App. X15-36)." Under the heading "The Findings of the District Court (App. X8)," it did state that the District Court "found that Seligson's testimony as to what the words 'about the room meant' was not credible (App. X14)."

On November 14, 1982, petitioner filed a petition for rehearing, suggesting that it be *en banc*. In denying the

petition for rehearing suggesting a rehearing *en banc*, the Court of Appeals said:

> The petition for rehearing is denied. As to the issue of "actual malice," the appellee misreads and mischaracterizes our opinion. We did not focus on the state of mind of the editorial staff; we focused on the state of mind of Seligson (author) and the editorial staff which reviewed and modified Seligson's report.
>
> As to the second point raised by appellees, we think the standard of review as set forth on page 12 of the slip opinion [not limited to the clearly erroneous standard of FED. R. CIV. P. 52(a)] is correct and was properly applied. Order of November 23, 1982 (Pet. 22-23).

## Summary of the Argument

It is well settled that in all actions tried upon the facts without a jury, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a). *Inwood Laboratories, Inc. v.*

*Ives Laboratories, Inc.*, 456 U.S. 844, 72 L. Ed. 2d 606 (1982). Rule 52 does not make exceptions or purport to exclude any categories of factual findings from the obligation of a Court of Appeals to accept a District Court's findings unless clearly erroneous. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). The "clearly erroneous" rule applies when the district court makes findings of fact on intent in order to apply the governing constitutional law and determine whether the plaintiff has met its burden of proof. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 417 (1977) and 443 U.S. 526, 534 n.8 (1979); see *Mayor v. Educational Equality League*, 415 U.S. 605, 621 n.20 (1974). An appellate court examining the trier's findings with the extra care required in First Amendment cases is bound by the trier's finding of knowing falsity

or reckless disregard for the truth when there is sufficient evidence to support the material findings, regardless of the appellate court's agreement with such finding. *Cher v. Forum International*, 694 F.2d 634, 640 (9th Cir. 1982), *petitions for cert. filed*, 51 U.S.L.W. 3791, 3792 (U.S. Apr. 18 and 19, 1983) (Nos. 82-1719, 82-1740).

There was ample evidence to support the District Court's finding that petitioner had proved by clear and convincing proof that the publication of the false and disparaging statement was not made in good faith. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). The District Court found that Seligson knew at the time the Article was published that the false and disparaging statement did not accurately describe what he and Lefkow observed (App. X142-43). The District

Court found that Seligson's testimony to the contrary was not credible, based on his testimony and demeanor (App. X142).

Other evidence supported this finding. Respondent refused to demonstrate that instruments heard through the Bose system tended to wander about the room in the June 1970 meeting where Dr. Bose twice requested a demonstration (J.A. 67-71), and Seligson testified he could have set up a demonstration in half an hour (J.A. 139). Respondent refused to identify any stereo record used in the "special listening tests" on which the false and disparaging statement was based despite a promise by Seligson to identify these stereo records (J.A. 71, A394-95). Respondent failed to conduct and record comparative tests on observations of instruments heard through conventional stereo speakers of the same stereo

recordings heard through the Bose speakers (PX9, J.A. 339-40). Such tests would have attributed any wandering observed to the stereo records, not the Bose speakers (J.A. 52-57).

The only other "individual" instrument and Lefkow reported hearing during the several-hour "special listening test" was a piano that they observed remained stationary (J.A. 148, 159, 244). It was false to state, "Worse, individual instruments heard through the Bose system . . . tended to wander about the room," when Seligson and Lefkow testified hearing only sounds of a single instrument move between left and right speakers(J.A. 148, 159, 244), a common effect in stereo speaker systems (App. X101, J.A. 52-57, 234-36, 312-14, 325-26).

By rejecting the trial judge's findings on the credibility of witnesses

and relying on testimony which the trial judge found to be not credible, the Court of Appeals deprived petitioner of property without due process of law. U. S. Const. Amend. V. Petitioner's right to obtain judicial relief for the harm caused by respondent's publication of the false and disparaging statement is a property right of which petitioner cannot be deprived without due process of law. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Due process requires that an appellate court follow the directions in FED. R. CIV. P. 52 for deference to trial court judgment on the credibility of witnesses. The Court of Appeals deprived petitioner of a judgment against respondent by ignoring key findings by the trial judge that the testimony of Seligson on his knowledge of

falsity at the time of the publication was not credible (App. X142) and that Florman's testimony was "wholly untrustworthy" and "not credible (App. X163)."

*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny did not abrogate the requirement of Rule 52 that findings of fact cannot be set aside on appeal unless clearly erroneous. The rationale for justifying a special standard of proof for "hot news" publications like *The New York Times* and TIME, *Time, Inc. v. Pape*, 401 U.S. 279 (1971), may be the limited ability of a daily newspaper or weekly news magazine under the pressure of deadlines to verify the accuracy of published statements based on information furnished by others. Here respondent published the false and disparaging statement written by its own engineer based on a "special listening

test" he and another engineer conducted in its own laboratories in January, 1970, about three months before publication in April 1970. Neither *New York Times* nor its progeny purported to usurp for appellate court judges, who do not hear witnesses testify, the right to ignore findings by trial court judges, who actually see and hear the witnesses testifying, on the demeanor and credibility of witnesses. "The finder of fact must determine whether the publication was indeed made in good faith." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

## Argument

I. IT IS SETTLED THAT FED. R. CIV. P. 52(a) REQUIRES THAT FINDINGS OF FACT NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS EVEN WHEN CONSTITUTIONAL RIGHTS ARE ASSERTED.

It is well settled that in all actions tried upon the facts without a jury, "Findings of fact shall not be set

aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a). *E.g. Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 72 L.Ed.2d 606 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

In *Pullman-Standard* the Court said:

> Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. 456 U.S. at 287.

In *Inwood* the Court further explained:

> That rule recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence. . . . Because of the deference due the trial judge, unless an appellate court is left with the "definite and firm conviction that a mistake has been committed," . . . it

> must accept the trial court's findings. (footnote omitted) 72 L.Ed.2d at 616, 456 U.S. at 855-56.

In contrast, in the present case the Court of Appeals said:

> In performing this review we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a); instead, we must perform a de novo review, independently examining the record to insure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof (App. X22-23).

This Court, however, has held that the "clearly erroneous" rule applies even when constitutional rights are asserted under the equal protection clause of the Fourteenth Amendment. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 417 (1977) (Dayton I) and 443 U.S. 526, 534 n.8. (1979) (Dayton II). See *Mayor v. Educational Equality League*, 415 U.S. 605, 621 n.20 (1974).

In *Dayton I*, dealing with findings of fact related to intentional segregation of

school children, the Court said:

> On appeal, the task of a court of appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the district court are clearly erroneous, it may set them aside under Fed Rules Civ Proc 52(a). 433 U.S. at 417.

In *Dayton II* the Court said:

> We have no quarrel with our Brother Stewart's general conclusion that there is great value in appellate courts showing deference to the fact-finding of local trial judges. Ante, at 470-471. The clearly erroneous standard serves that purpose well. 443 U.S. at 534 n.8.

There is no logical distinction between review of a finding of publication in bad faith, made here by the "finder of fact [who] must determine whether the publication was indeed made in good faith," *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (involving a First Amendment claim), and review of a finding on intentional discrimination by the finder of fact in *Dayton* and *Mayor*

(involving Fourteenth Amendment claims). The "clearly erroneous" standard serves the purpose of recognizing that appellate courts must show deference to the fact finding of local trial judges regardless of what type of litigation is involved. *Dayton II*, 433 U.S. at 534 n.8. An appellate court examining the trier's findings with the extra care required in First Amendment cases is bound by the trier's finding of knowing falsity or reckless disregard for the truth when there is enough evidence to support the material findings, regardless of the appellate court's agreement with such finding. *Cher v. Forum International*, 694 F.2d 634, 640 (9th Cir. 1982), *petitions for cert. filed*, 51 U.S.L.W. 3791, 3792 (U.S. Apr. 18 and 19, 1983) (Nos. 82-1719, 82-1740).

Adherence to the clearly erroneous

standard is particularly required here where the lack of credibility of Seligson as a witness was crucial to the finding by the District Court that respondent published the false and disparaging statement in bad faith because Seligson, the author of the statement, knew that the "panelists" [Seligson and Lefkow] did not hear individual instruments through the Bose system that "tended to wander about the room."

The appellate court judges did not hear or see a witness testify, and could not observe the "look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration . . .," *United States v. Raddatz*, 447 U.S. 667, 679 (1980), which a trial judge observes while listening to and watching a witness testify for days

under direct and cross examination. In this case witness Seligson testified on six trial days, and his testimony is recorded on 593 pages (Tr. 6-111 to 6-168, 7-2 to 7-129, 8-4 to 8-65, 9-2 to 9-158, 10-2 to 10-150, 11-2 to 11-42). That transcript was condensed to only 96 pages in the Record Appendix before the Court of Appeals (A104-99). These cold pages cannot record for the reviewing appellate judges the impressions on credibility the trial judge received while actually watching and listening to Seligson testify, which influenced the District Court to rule on Seligson's knowledge of the falsity of the false and disparaging statement that, "After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible (App. X142)."

Manifestly, the District Court was correct in relying on *St. Amant v. Thompson*, 390 U.S. 727 (1968) (App. X139) and focusing on the knowledge of falsity by Seligson because he was one of the two "panelists," wrote the false and disparaging statement, and repeatedly reviewed it for accuracy (App. X140, X168 n.44). *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 253-54 (1974).

While the Constitution requires that all federal judges serve so long as they maintain good behavior with undiminished compensation, there is a constitutional requirement for appointment with the advice and consent of the Senate only for justices of this Court. Recognizing the wisdom of this policy, Congress has by statute required the same selection process for judges in the lower federal courts. 28 U.S.C. §§ 44(a), 133.

The policy behind these requirements for appointing federal judges is to insure the competence and fairness of all members of the federal bench. These standards for federal judges create confidence in litigants that the federal judge before whom they appear will fairly resolve factual disputes based on evidence presented in open court through witnesses who swear to tell the truth and are subject to probing cross examination, to help the trial court judge determine the credibility of each witness by observing the witness with ears and eyes.

No appellate judge has such an opportunity to judge witness's credibility or can derive it from a review of the cold transcript of what is said, that fails to preserve the visible and aural impressions perceived by the trial judge at the time the testimony is given. Only the trial

judge who actually heard a witness testify can use the transcript (and notes that may be taken while the witness testified) to refresh those impressions when making findings of fact. That is an important reason why Rule 52 binds an appellate court to accept findings of fact by the trial judge unless clearly erroneous. *United States v. Raddatz*, 447 U.S. 667, 697 n.3 (1980) (Marshall, J., dissenting). This Court and federal appellate courts have followed this rule for nearly half a century. The settled authority and the logic behind it requires reversal of the ruling by the Court of Appeals, that "In performing this review we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a) . . . (App. X22)."

II. THE FINDINGS BY THE DISTRICT COURT THAT AUTHOR SELIGSON KNEW AT THE TIME OF THE PUBLICATION OF THE ARTICLE THAT THE FALSE AND DISPARAGING STATEMENT DID NOT ACCURATELY DESCRIBE THE EFFECTS THAT HE AND LEFKOW HEARD DURING THE "SPECIAL LISTENING TEST" AND THAT HIS TESTIMONY TO THE CONTRARY WAS NOT CREDIBLE AND THE OTHER EVIDENCE SUPPORT THE FINDING THAT PETITIONER PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT PUBLISHED THE FALSE AND DISPARAGING STATEMENT WITH "ACTUAL MALICE."

The Court of Appeals expressly ruled that the statement found damaging to petitioner was disparaging, and assumed that the statement was both factual and false (X19-21). The evidence abundantly supports that assumption. *Supra* 9-15. We therefore turn to the clear and convincing evidence supporting the District Court's finding that respondent published the false and disparaging statement with knowledge that it was false or with reckless disregard of its truth or falsity (App. X142-43).

The testimony of Seligson in and of

itself is clear and convincing proof that he knew that the words "Worse, individual instruments heard through the Bose system . . . tended to wander about the room" in the false and disparaging statement did not accurately describe the effects he and the other "panelist," Lefkow, testified they heard during the "special listening test." Seligson is an engineer with over 25 years of experience in testing loudspeakers and received a patent on his own loudspeaker invention at the time he was supervising the tests for the Article (App. X51-52, X61-63). Seligson selected as "panelists" himself and Lefkow, an engineer with a masters degree in electrical engineering from Columbia (X52), as most suitable to make the observations for "the special listening test (J.A. 97)." Engineers are expected

to accurately describe their observations of tests in their technical reports. The District Court found, "Seligson is an intelligent person whose knowledge of the English language cannot be questioned (App. X142)." That finding is amply supported by the proficiency in the use of the English language Seligson demonstrated during his testimony on six trial days on direct, cross, redirect and recross (A104-99, Tr. 6-111 to 11-42). The conclusion is inescapable that Seligson knew when he wrote the original report to editorial (PX10, App. X155, X161) and reviewed the final proof of the Article for accuracy (J.A. 145) that the words "Worse, individual instruments heard through the *Bose* system . . . tended to wander about the room" did not describe what he and Lefkow testified they observed -- movement between the left and right

speakers, as commonly heard through any stereo speaker system as a natural consequence of the stereo recording process (App. X101).

There was thus clear and convincing evidence in the record to support the finding of the District Court, "It is simply impossible for the Court to believe that he [Seligson] interprets a commonplace word such as 'about' to mean anything other than its plain ordinary meaning (App. X142)."

To put it directly, the District Court found that Seligson lied when he wrote the false and disparaging statement in February 1970, lied to Dr. Bose in June of 1970 when he said all the "panelists" heard the instruments wandering "out into the room" (J.A. 64-65) and lied under oath at trial in 1980 when he told the District Court he believed the Article

accurately described what he and Lefkow testified they observed.

It can hardly be doubted that respondent through author Seligson, *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 253-54 (1974), knew of the falsity. See *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

Other evidence supports the finding that petitioner proved actual malice with clear and convincing proof. Although the Article represented that respondent merely repeated the "cricket" experiment comparing the Bose system with two others and only substituting "a variety of stereo records" for the "special tape . . . of a cricket-like noisemaker moving from extreme left to extreme right" made by respondent's engineers in an anechoic chamber (App. X48), the "special listening test" panel was different from the "cricket" panel (App. X70-71), the special

listening test "panel" tested only the Bose system (J.A. 227, 240), and respondent has never identified even one of these stereo records (App. X194, A394-95), although Seligson promised Dr. Bose he would identify them (J.A. 71).

Lefkow testified that when listening to records played through the Bose 901 system on November 24, 1969, he heard no instruments tending to wander about the room (J.A. 238. Lefkow testified as follows on cross-examination:

> Q With stereo speakers you would expect that, at times, the sound would come from various points between the speakers?
>
> A If that was what was intended.
>
> Q Now, that would happen with any good quality brand of speakers, wouldn't it?
>
> A Again, if the recording had the information contained (J.A. 235-36).

Yet the two "panelists" Seligson and Lefkow made no tests to determine if the

sound coming from various points between the two Bose speakers that they testified observing during the "special listening test" was caused by "the recording . . . [having] the information contained." As engineers knowledgeable in stereo loudspeakers, both Seligson and Lefkow knew that it was normal for the sound to come from various points between the left and right speakers when listening to stereo recordings. If, as they testified, they observed violin sounds moving back and forth between the left and right Bose speakers, they must have known that this movement was caused by information contained in the stereo recording. They readily could have confirmed that the stereo record, not the Bose loudspeakers, was the cause of the observed movement between speakers, by playing the same stereo record through conventional

speakers and observing the same movement (J.A. 52-57).

It was reckless for respondent to report, "Worse, individual instruments heard through the Bose system tended . . . to wander about the room," when the author Seligson knew that he and Lefkow observed only movement between the Bose speakers which they also would have observed had they made the simple test of playing the same stereo recordings through a pair of conventional stereo speakers.

The failure of respondent to identify even one of the stereo recordings claimed to have been used in the "special listening test" (App. X194) is another piece of evidence in the clear and convincing proof of actual malice. The laboratory project notebook (PX9, J.A. 97-103, 232-33) represented as recording the results of the "special listening

test," failed to identify even one of the stereo test records while recording that the two "panelists" listened to the Bose speakers for several hours.

This failure, especially after Seligson promised on June 3, 1970, to identify these stereo recordings to Dr. Bose (J.A. 71), supports a conclusion that Seligson knew that he could not identify any stereo records which would produce wandering effects through Bose speakers different from those produced through conventional speakers.

Seligson used the word "instruments" in the false and disparaging statement although the only "individual instruments" identified in the "special listening test" were the violin and piano, and both Seligson and Lefkow testified that they observed only violin sounds wandering between the speakers. They testified that the piano

sounds did not move (J.A. 148, 159, 244). They identified no other instruments heard during the "special listening test." Respondent was reckless in ascribing "wandering about the room" to "instruments heard through the Bose system" when its engineers claimed to have observed movement between the speakers of only one of the two individual instruments they claimed to have heard in several hours of listening. No responsible engineer would have written or approved the false and disparaging statement without listening to recordings of a number of instruments and eliminating the stereo record as the source of any observed wandering by listening to the same stereo record through a conventional pair of stereo speakers.

Respondent could have conducted listening tests with a panel of twelve young

music students as Seligson represented respondent used for listening tests in the 1969 article in *Stereo Review* (PX6) to check on the observations of two "panelists" Seligson and Lefkow. Seligson knew that no unbiased panel would have observed the grotesque effects attributed to the Bose system in the false and disparaging statement.

We submit that no proof of "actual malice" could be more clear or convincing than the testimony of the two "panelists" whose observations were used as the basis for the false and disparaging statement -- electrical engineers knowledgeable on stereo speakers -- that what they observed was not what the Article reported they heard, and the admission by the author of the statement that he knew it (J.A. 124). *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 253-54 (1974). Surely representing

that, "Worse, individual instruments heard through the Bose system . . . tended to wander about the room" with no basis for it is the making of a false and disparaging statement with reckless disregard for its truth or falsity.

III. BY REJECTING THE TRIAL JUDGE'S FINDINGS ON THE CREDIBILITY OF WITNESSES AND RELYING ON TESTIMONY WHICH THE TRIAL JUDGE FOUND TO BE NOT CREDIBLE, THE COURT OF APPEALS HAS DEPRIVED THE PETITIONER OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The provision in Federal Rule of Civil Procedure 52(a) that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses" is more than an arbitrary or convenient rule of procedure. The requirement for deference to trial court judgment on the credibility of witnesses embodies a fundamental aspect of the Fifth Amendment requirement that "No person shall . . . be

deprived of . . . property, without due process of law."

The right of petitioner to obtain judicial relief for the harm done to it by respondent's publication of the false and disparaging statement is a property right. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Petitioner may not be deprived of that property right without due process of law.

> The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982).

It is essential to the concept of Due Process of Law that the trier of the facts, whether judge or jury, determine the credibility of those witnesses who appear and testify in court.

Due Process of Law requires that a

party be afforded the opportunity for cross-examination of the witnesses who appear before the trier of the facts. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Pointer v. Texas*, 380 U.S. 400, 405 (1965):

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. 380 U.S. at 405.

*Chambers* and *Pointer* were criminal cases, but the same principle is no less applicable to civil actions. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (termination of welfare benefits); *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959) (denial of security clearance). For example, in *Goldberg* the Court observed that:

> In almost every setting where important decisions turn on questions of fact, due process

> requires an opportunity to confront and cross-examine adverse witnesses. 397 U.S. at 269.

A primary purpose of cross-examination, and perhaps the most important purpose of cross-examination, is to aid the trier of facts in assessing the credibility of the witnesses.

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

> It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given to their testimony can be appraised. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

The demeanor of the witness while testifying may be crucial as to his credibility. Listening to an electronic recording of oral testimony is not equivalent to observing the witness as he testifies. *Wingo v. Wedding*, 418 U.S. 461, 473-474 (1974).

> Any experienced lawyer is aware that findings of fact frequently rest on impressions of demeanor and other factors which do not appear on the face of the record. *United States v. Raddatz*, 447 U.S. 667, 696 (1980) (Marshall, J., dissenting).

Therefore an appellate court must not disregard the findings of the trial judge who had the opportunity "to judge of the credibility of the witnesses."

> "Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded . . . ." *United States v. Oregon State Medical Society*, 343 U.S. 326, 339 (1952), quoting with approval from *Boyd v. Boyd*, 252 N.Y. 422, 429, 169 N.E. 632, 634 (1930).

Just as the provisions of FED. R. CIV. P. 37 ". . . must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law," *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958), so must the provisions of Rule 52(a) relating to the credibility of

witnesses be followed by a Court of Appeals in order that a party shall not be deprived of property without Due Process of Law.

When an appellate court rejects the findings of the trial judge on issues of the credibility of witnesses who were seen and heard by the trial judge, and instead arrives at its own conclusions as to the facts on the basis of "the cold record," *United States v. Raddatz*, 447 U.S. 667, 679 (1980) -- or, worse, overturns a judgment on the basis of testimony which the trial judge found to be not credible -- the party in whose favor the judgment was entered is deprived of property rights without due process of law.

That is precisely what happened in the present case.

Seligson and Lefkow, the two CU engineers who constituted the "panel" for

the "special listening test," testified that the only "wandering" of an instrument which they heard was the apparent movement of violin sounds (J.A. 148, 172, 231) between the two Bose 901 loudspeakers (J.A. 124, 156-59, 244-46) or along the wall immediately behind and between the two speakers (J.A. 123, 253; PX29, J.A. 170-71, 342; PX35, J.A. 257-58, 343).

Lefkow admitted that it is common for the sound to come from various points between two stereo loudspeakers (J.A. 234-35), and both Dr. Bose (J.A. 52-57) and CU's expert witness, Dr. Green (J.A. 312-14, 325-26) agreed.

Seligson testified that on the basis of the "special listening test" (J.A. 102-03) he wrote the draft report to editorial (J.A. 126, 145) which said, "Instruments . . . appeared to suffer from

. . . a tendency to wander around the room" (PX10, App. X155, X161) and then approved the slightly revised wording (J.A. 145), "Worse, individual instruments . . . tended to wander about the room."

The trial judge naturally concluded that what Seligson wrote did not describe what he and Lefkow had heard (App. X103-104).

Seligson testified that the language in the Article was intended to describe what he and Lefkow had heard (J.A. 123, 124, 147, 169), but the District Court judge expressly found:

> After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible (App. X142)."

The Court of Appeals ignored this express finding with respect to the credibility of Seligson (or the lack thereof) and, in effect, found Seligson's testimony

on this point to be credible and convincing (Compare App. X34-35 with X141-42).

The Court of Appeals found further support for its conclusions in evidence of how the "associate technical director" of CU construed the language in issue when he reviewed Seligson's draft to editorial (App. X33-34). The Court of Appeals did not identify the "associate technical director" by name, but it was Monte Florman (J.A. 196), and the evidence about review by the associate technical director on which the Court of Appeals relied was testimony of Florman. Compare App. X33-34 with J.A. 198-199, 214-219.

The District Court judge had found expressly that "Florman's testimony is wholly untrustworthy and is not credible (App. X163)."

Thus the Court of Appeals has deprived petitioner of a judgment against

respondent by making a "de novo review" (App. X22) of the record and finding an absence of "actual malice" on the basis of the testimony of Seligson, which the trial judge found to be "not credible" (App. X142), and the testimony of Florman, which the trial judge found to be "wholly untrustworthy" and "not credible" (App. X163).

By adopting such an approach to its review of the decision of the District Court, the Court of Appeals not only violated the requirements of FED. R. CIV. P. 52(a) but, worse, deprived petitioner of property without Due Process of Law in violation of the Fifth Amendment.

IV. NOTHING IN NEW YORK TIMES OR ITS PROGENY ALLOWS THE COURT OF APPEALS TO IGNORE THE REQUIREMENTS OF RULE 52(a).

The Court of Appeals cited *New York Times v. Sullivan*, 376 U.S. 254 at 285 & n.26 and *Time, Inc. v. Pape*, 401 U.S. 279,

284 (1971) in support of its proposition that it was not limited to the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) (X22-23).

*New York Times* did not consider Rule 52(a), but involved review of a jury trial. After stating, "We must 'make an independent examination of the whole record,' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression,[26]", this Court explained in note 26 that the Seventh Amendment provision that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," did not preclude such an independent review because "its ban on re-examination of facts does not preclude us from determining whether governing rules of

federal law have been properly applied to the facts." 376 U.S. at 285 n.26.

*Time* also involved a jury trial and did not mention Rule 52(a). The Court ruled on the propriety of a directed verdict for Time which, of course, requires viewing the evidence presented in the light most favorable to the plaintiff. *E.g., Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 696 (1962) and authorities cited in n.6.

The Court said in *Time*:

> The only question before us, therefore, is whether the Court of Appeals correctly applied this constitutional rule [requiring proof of actual malice] to the facts of this case in reversing the directed verdict for the defendant. Inquiries of this kind are familiar under the settled principle that "[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." 401 U.S. at 284 (Emphasis added).

In the evidentiary review which followed there was no dispute on the facts. The Court said, "The publisher who maintains a standard of care such as to avoid knowing falsehood or reckless disregard of the truth is thereby given assurance that those errors that nonetheless occur will not lay him open to an indeterminate financial liability." 401 U.S. at 291. In concluding its opinion with a cautionary note that the decision was based on the specific facts of the case, involving a news report of a particular government publication, the Court quoted with approval the following statement from *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968):

> "Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true

ones." 401 U.S. at 292.

The rule first annunciated in *New York Times* restricted the liabilities of those who utter defamatory falsehoods regarding public officials. The Court there recognized that because "erroneous statement is inevitable in free debate," 376 U.S. at 271, "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct." *Id.* 273. But the Constitution does not grant absolute immunity to anyone, whether the news media or not, who libels a public official, nor has the Court ever concluded that the usual processes of law are inadequate for dealing with this kind of litigation. The Court decided that the substantial First Amendment interests implicated in any libel suit against a public official would be adequately served by a constitutional

rule that subjects a false and disparaging statement to the sanctions of the common law of libel only where it was uttered "with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* 280. The Court "has made it clear that 'actual malice' is not to be equated with spite, ill will, intention to harm, or the like." Annot., 61 L.ed. 2d 944, 995 (1980) and cases cited.

The District Court discussed the progeny of *New York Times*, saying the Court extended the constitutional privilege to public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and to a private individual involved in an event of public or general concern in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), and reverted to a status-based test in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)

(App. X109-10). The District Court then ruled that the *New York Times* actual malice standard applies to product disparagement cases and that petitioner, a corporation, was a "public figure" and required to show, by clear and convincing proof, that the false and disparaging statement was published by respondent with the knowledge that it was false or with reckless disregard of its truth or falsity (App. X111-33). Whatever validity that analysis may have for imposing stringent standards of proof of actual malice upon petitioner at trial, see generally Annot., 61 L.ed. 2d 944 (1980), it is unfair to deprive a damaged plaintiff, who *has* proven actual malice by clear and convincing proof, of a recovery from a lying defendant by allowing an appellate court to independently make its own findings of fact untrammelled by the

"clearly erroneous" standard of Rule 52(a) or findings on credibility by the trial judge.

There may be some justification for relaxing the standards of care for veracity imposed on "hot news" publications commenting on public officials and governmental publications as in *New York Times* and *Time*, by a daily newspaper and weekly news magazine, respectively, reporting upon information received from others. These publications often have little time to conduct a thorough review of a disparaging statement because of approaching deadlines for a "hot news" story paraphrasing or condensing information received from others.

Respondent did not report "hot news" based on information or publications of others. It published a report on tests

conducted by its own expert engineers and technicians begun more than five months before publication, and published the false and disparaging statement, knowing it to be false, based on the "special listening test" allegedly conducted nearly three months before publication.

Since respondent published what it represented to the public was a report based on carefully controlled tests by its expert engineers and the supervising engineer actually wrote the false and disparaging statement, there is no policy justification for expanding the constitutional privilege requiring "clear and convincing proof" of actual malice to disregard the "clearly erroneous" standard of appellate review and set aside the trial judge's findings of fact on the basis of clear and convincing proof.

Since petitioner proved actual malice

by clear and convincing proof, it was unnecessary for the District Court to rule on whether the *New York Times* actual malice standard applies to product disparagement cases. The District Court assumed that in this product disparagement action

> we are concerned with the manufacturer's interest in the reputation of its product, an interest not nearly as significant as an individual's interest in his personal reputation and hardly "at the root of any decent system of ordered liberty." Damage to a product's reputation, unlike damage to the reputation of an individual, can always be measured in terms of monetary loss. Moreover, a manufacturer almost always has access to the channels of communication that can be used to refute disparaging comments about its product (App. X115-16).

There are a number of fallacies in that reasoning. The enormous power which respondent has in the marketplace can damage the business of the manufacturer to such an extent that the manufacturer has no financial resources necessary to obtain

vindication in the courts. Dr. Bose testified about a person who lost his company because of a report in respondent's magazine (A392).

The resultant loss of sales means lost jobs to those employees engaged in the manufacture and sale of the disparaged products. The livelihood of workers of modest means is, we submit, at least as important as the personal reputation of a person defamed.

Furthermore, the manufacturer does not have access to the channels of communication to the millions of consumers who rely upon respondent's representation that "CU pledges that any opinions entering into its ratings of products shall be as free of bias as it is possible to make them (App. X144)." The Magazine Publishers Association of America and the publishers of the *Wall Street Journal* and

*Barron's* supported respondent with amicus curiae briefs in the court below. It is unrealistic to expect these publications to afford petitioner a channel to inform consumers of the respondent's breach of their trust by falsely disparaging the Bose system.

The primary function of our legal system is to establish rules for governing the prelitigation conduct of citizens so as to avoid litigation and lead to amicable resolution of disputes consistent with traditional concepts of fair play and substantial justice. A rule of law subjecting a plaintiff, who has proved at trial by clear and convincing evidence that a publisher published a false and disparaging statement with knowledge of its falsity or reckless disregard of its truth or falsity, to another extraordinary burden on appeal, does not foster the

policies of the First Amendment. Such a rule only condones irresponsible publishing practices and provides no incentive for a publisher to monitor for truth or to promptly print retractions when false and disparaging statements are made.

The rule we urge here of maintaining the clearly erroneous standard of review and applying conventional rules of law to a magazine that prints the results of tests conducted by its own engineers furthers the true spirit of the First Amendment. That true spirit fosters responsible publishing by encouraging publishers to monitor their publications for accuracy, to promptly print retractions of false statements and to condemn lying, of which the District Court found respondent guilty here by clear and convincing proof.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed, with instructions to reinstate the District Court judgment for petitioner on liability and to conduct its review of the findings on damages in conformity with the "clearly erroneous" standard of Rule 52(a).

Respectfully submitted,

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